

When a Reporter Enters a Bamboo Grove: Reflections on *Serial*

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I. INTRODUCTION

In the classic short story *In a Bamboo Grove*, by Ryunosuke Akutagawa,¹ the statements of various witnesses to a murder move the reader ever closer to knowing what happened, but then begin to conflict, to veer in unexpected directions. The more the characters speak of what they saw or did, the more each narrative casts doubt on the others and the less clear the identity of the killer is. At the end of the story, only ambiguity remains. To anyone who has investigated anything, let alone to a news reporter whose job is to investigate, the uncertainty that the story builds must be familiar.

Listeners who followed a journalist's investigation of a murder committed in Baltimore in 1999 through *Serial*, a wildly popular podcast, probably are also familiar with this uncertainty. In *Serial*, a superb reporter, working with time and resources available to fewer and fewer of her kind,² re-investigates the seventeen-year-old case with fresh eyes and sharp mind. As I started listening to the program, my hopes were high. What a resource, I thought, to draw upon in teaching criminal law and criminal procedure to law students; what an eye-opener for those in the larger, lay audience who are blissfully unaware of how criminal law enforcement is practiced and experienced in the United States; and what a tool to illustrate how elusive, how murky, how ultimately uncertain the past is and consequently how unsettling the punishment of a suspected wrongdoer can be.

The program, available as a series of audio episodes to be listened to on phones, portable audio players, computers, and perhaps other devices, has been a runaway success—at the time the most listened-to, or at least downloaded, podcast in the history of the medium.³ Its success drew commentary from *The New York*

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¹ RYŪNOSUKE AKUTAGAWA, *RASHMŌN AND SEVENTEEN OTHER STORIES* 10 (2006) (Jay Rubin, trans., Penguin Classics 2006).

² David Carr, *Muckraking Pays, Just Not in Profit*, N.Y. TIMES (Dec. 10, 2007), http://www.nytimes.com/2007/12/10/business/media/10carr.html?_r=& (reporting that “under pressure from the public markets or their private equity owners, newsrooms have been cutting foreign bureaus, Washington reporters and investigative capacity”).

³ Dwight Garner, *As the Digging Ends, A Desire for ‘Eureka’*, N.Y. TIMES, Dec. 19, 2014, at C1 (reporting that *Serial* was “the most popular podcast in the history of the form”); see also Ellen

Times,⁴ its reporting and storytelling have been analyzed by *The New Yorker*⁵ and *The Huffington Post*,⁶ and its tone has even been mocked by writers for *The Onion*.⁷ The appeal of the program, which as its title suggests consists of a serial telling of a months-long investigation, demands analysis by those of us concerned with the effects and the legitimacy of criminal law enforcement. Perhaps the podcast has created an opportunity to reinvigorate a conversation about how we investigate, evaluate, and punish.

For me, a journalist turned law professor, *Serial* is a treat because it brings together two lifelong interests, in the workings of stories and in the wreaking of justice. It is a treat because it invites reflection upon the similarities and differences between the missions of the lawyer and of the journalist. And it is a treat because analysis of the messages and meanings of *Serial* implicates larger questions about the reach of journalistic critique, about the limits of efforts to subvert social and legal structures that produce unequal outcomes for people of different races and socioeconomic positions, and about the practicability of developing an enforcement regime not characterized by such inequality. The pages that follow indulge in such reflection and analysis.

The treatment of the criminal justice system by the media is a perennial concern of lawyers and the legal academy. How people view the processes and, perhaps more importantly, the results of investigations and judicial proceedings has implications for the credibility and legitimacy of the state and its laws.

Gamerman, *'Serial' Podcast Catches Fire*, WALL ST. J. (Nov. 13, 2014), <http://www.wsj.com/articles/serial-podcast-catches-fire-1415921853> (reporting that *Serial* is a "certified sensation . . . [that has] quickly become the most popular podcast in the world, according to Apple, and the fastest to reach 5 million downloads and streams in iTunes history . . . [and] the top podcast in the U.S., Canada, the U.K. and Australia, and in the top 10 in Germany, South Africa and India").

⁴ See, e.g., Garner, *supra* note 3, at C1, C12 (posing the question, in light of the podcast's popularity, "Would Ms. Koenig be able to guide *Serial* home—that is, would it arrive at resolution about the guilt or innocence of the imprisoned young man, Adnan Syed, at its center—or would it pull a slow fade into indeterminacy, like the Philae comet lander, which ditched in the shade and slowly lost battery power?"); see also Gamerman, *supra* note 3.

⁵ Sarah Larson, *What 'Serial' Really Taught Us*, THE NEW YORKER (Dec. 18, 2014), <http://www.newyorker.com/culture/sarah-larson/serial-really-taught-us>.

⁶ Andy McDonald, *This Is How Obsessed People Are With 'Serial' Right Now*, HUFFINGTON POST (Nov. 13, 2014), http://www.huffingtonpost.com/2014/11/13/people-obsessed-over-serial_n_6152032.html.

⁷ Marah Eakin, *Introducing The Serial Serial, The A.V. Club's New Podcast About Serial*, A.V. CLUB (Nov. 14, 2014), <http://www.avclub.com/article/introducing-serial-serial-v-clubs-new-podcast-abou-211881> ("Since we were having so much fun participating in . . . chats, hashing out theories, and delving into *Serial*'s insane online community, we decided to contribute a little bit of insane fandom ourselves.").

Credibility and legitimacy in turn have implications for compliance.⁸ To the extent that the roving eye of an investigative reporter uncovers bias in the administration of justice, corruption in the exercise of power, or arbitrary or erroneous enforcement that punishes the innocent, media reports can provoke difficult and important conversations, as well as kindle resentment and even willful resistance to the demands of laws deemed unjust.⁹

As a scholar, I have grave concerns about our national practice of criminal law enforcement, adjudication, and punishment. My interest in *Serial* is therefore driven in large part by a desire to develop compelling arguments for changing those practices. To be sure, my excitement over the program and the possibilities it presents is tempered by a recognition of the difficulty of the task, of the strength of the narratives, the *nomos*,¹⁰ that justify the criminal enforcement regime we have. Yet I appreciate tremendously the effort to tell a counter-story using a single, real case, involving a very real young man sentenced to spend the rest of his life in a Maryland prison for a crime he may not have committed. To the extent that I found *Serial* frustrating, it is because the podcast shied away from difficult questions about how typical the case under investigation was, how often defendants are convicted on the basis of murky facts—and what the answers to those questions might reveal about the criminal justice system.¹¹

This brief Essay offers a critical analysis of *Serial* in three parts. Part II situates the podcast in the context of media scrutiny of the law and analyzes the differences in mission that distinguish the journalist from the lawyer. The stated intention of the journalist, unlike that of the lawyer participating in the machinery of the courts, is to determine precisely what happened.¹² Pursuing this mission depends critically on the conviction that there exists a truth susceptible to discovery. As an outsider to the world of law, the journalist may claim to work free of conflicts of interest because she has neither the defendant nor the

⁸ Tracey L. Meares et al., *Updating the Study of Punishment*, 56 STAN. L. REV. 1171, 1196 (2004) (suggesting that compliance with the law is more likely the more those subject to the law accept its demands and constraints as legitimate and fair).

⁹ *Id.*

¹⁰ Professor Robert Cover defined *nomos* as a “normative universe,” the inhabitants of which “constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void.” Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983). Formal laws matter in this process, but “[n]o set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning.” *Id.* at 4–5.

¹¹ Sarah Lustbader, a public defender in the Bronx, attempted to put the procedural posture of the defendant in *Serial* into context, comparing his case to the more typical one, which ends with a plea deal. Sarah Lustbader, *‘Serial’ Missed Its Chance to Show How Unfair the Criminal Justice System Really Is*, WASH. POST (Dec. 17, 2014), <http://www.washingtonpost.com/posteverything/wp/2014/12/17/serial-missed-its-chance-to-show-how-unfair-the-criminal-justice-system-really-is/>.

¹² Dan Barry et al., *Times Reporter Who Resigned Leaves Long Trail of Deception*, N.Y. TIMES, May 11, 2003, at A1 (reminding us, in the wake of a stunning revelation of journalistic fraud, that “the cardinal tenet of journalism . . . is simply truth”).

government as a client. This Part concludes by briefly summarizing critical events in the story told by *Serial*.

Part III analyzes paths not taken by the podcast, identifying the ways in which the story bypasses deeply unsettling aspects of criminal law enforcement in the United States. This Part then explores how the podcast might have furthered a conversation about the methods and effects of criminal law enforcement. Part IV finds a silver lining in another, related podcast, one far less popular than *Serial* was but one that I suggest aspiring lawyers, at least, may want to listen to in order to understand better the challenges and rewards they might one day face. Part V concludes.

II. THE JOURNALIST

The stated mission of the journalist is to uncover, to understand, and to explain. The journalist's report, a spotlight on potential misconduct, may hold the powerful to account and in so doing offer solace to the disempowered and vulnerable. Journalism plays an essential role as translator of law for those who have not studied it. Reporters writing about the law, either as the focus of their beat or because questions of law arise in another context, also feed an insatiable interest on the part of the public. This interest is evident in the proliferation over the past two decades of media outlets that focus on law or even on specific issues within the law. We have SCOTUSblog, AbovetheLaw, and the *Wall Street Journal's* Law Blog, in addition to ongoing coverage by major newspapers, magazines, and television and cable news programs.

Yet scholarly analyses of journalists' work have found that coverage often does not report in neutral terms. Choices about which stories to tell, how much space to devote to the telling, and how to frame the tale by including some amount of context and history all can reflect norms and biases prevalent in the world of the news media.¹³ Reporters and their employers can burnish their reputations and win prizes by telling particular kinds of stories in particular ways. Coverage that is intuitively or counterintuitively appealing, that is linear and sounds logical, is reassuring. Thus it may be that while journalists profess devotion to truth-telling no matter how unsettling the tale, their conduct and their product may affirm rather than challenge certain perspectives. For example, it is one thing to suggest that human error in one component of a system resulted in conviction of an innocent defendant; it is another to suggest that the system is intrinsically flawed and that such devastating errors may occur too often, out of public sight. This Part situates *Serial* in the context of those scholarly assessments.

¹³ EDWARD S. HERMAN & NOAM CHOMSKY, *MANUFACTURING CONSENT: THE POLITICAL ECONOMY OF THE MASS MEDIA* xi (1988) (developing a "propaganda model" of media organizations' conduct to argue that media outlets "serve to mobilize support for the special interests that dominate the state and private activity").

A. *The Media and the Law*

In coverage of law, reporters identify noteworthy¹⁴ judicial decisions and explain their impact.¹⁵ They uncover obstacles to the administration of justice.¹⁶ They point out disparities in the administration of justice.¹⁷ In short, reporters pursue the same kinds of stories about the use and abuse of power that they pursue in other contexts. The journalist believes herself to be in pursuit of the truth, ideally without fear or favor.¹⁸ Yet reporters' coverage can also serve the interests of the powerful and justify acts that exploit the weak. Stories told about the application of the law matter because they shape perceptions of state authority and legitimacy. The organizations that produce reporting play a critical role in forming, reinforcing, and occasionally undermining¹⁹ widely shared beliefs.

The findings of the lawyer, or at least those findings that the lawyer is willing to share, must be suspect because the lawyer is an advocate. Unlike the journalist, the lawyer's investigation serves an argument. The lawyer representing a criminal defendant may be deliberately postmodern in approach, seeking alternative stories to fit facts in an effort to establish reasonable doubt, while the journalist seeks to find out *what happened*.²⁰ *Serial* proceeds on the implicit assumption that the

¹⁴ The determination of what is noteworthy, however, is not necessarily an objective process. Reporters and their editors seek readers and viewers and so make judgments based on assessments of what the audience is most likely to want to see, even as they also make judgments of what news matters.

¹⁵ See, e.g., Matthew Bloch et al., *The Health Care Supreme Court Case: Who Would Be Affected?*, N.Y. TIMES (Mar. 12, 2015), <http://www.nytimes.com/interactive/2015/03/03/us/potential-impact-of-the-supreme-courts-decision-on-health-care-subsidies.html> (explaining the possible effects of the Supreme Court's resolution of a challenge to the Obama Administration's signature health care law).

¹⁶ See, e.g., William Glaberson, *Waiting Years for Day in Court: Delays Freeze Bronx System, Stalling Lives and Eroding Trust*, N.Y. TIMES, Apr. 14, 2013, at A1 (first in a series of articles chronicling delays afflicting courts in the Bronx and describing the effects of those delays).

¹⁷ See, e.g., Mosi Secret, *Big Sentencing Disparity Seen for Judges: Trove of Data Brings Unprecedented Scrutiny to 885 Federal Jurists*, N.Y. TIMES, Mar. 6, 2013, at A23 (reporting on variability in median sentences imposed by different judges).

¹⁸ The reporter is subject to the views of her editors and/or producers, mindful of the opinions of her audience and cannot but be aware of any financial challenges to her enterprise. But those potential constraints are not the subject of this Essay.

¹⁹ Whether reporting on particular facts is subversive is powerfully affected by what Herman and Chomsky refer to as the "attention" given to each: the nature of "placement, tone, and repetitions, the framework of analysis within which it is presented, and the related facts that accompany it and give it meaning (or preclude understanding)." HERMAN & CHOMSKY, *supra* note 13, at xiv–xv.

²⁰ The journalist may indeed be skeptical of the truth-finding capacity of the adversarial system as a whole. The journalist may not see her role, her priorities, as shaped by the values of the institution of which she is a part. Yet institutional incentives, scholars have found, do help to explain why media organizations allocate their resources as they do. See HERMAN & CHOMSKY, *supra* note 13, at 304 (arguing that "[g]iven the imperatives of corporate organization and the workings of the

defense team, the prosecution team, the judge, the jury, and the police all failed to get to the truth, because no participant in the process that convicted Adnan Syed had both the incentive and the ability to investigate properly. Critical to this view of the case are missteps by Mr. Syed's defense team. His lawyer, M. Cristina Gutierrez, did not follow up on a potential alibi witness whom Sarah Koenig, *Serial*'s reporter, found and talked to.

Unlike a prosecutor, a journalist does not have at her discretion the power of the state to initiate a process that could result in deprivation of liberty. Unlike a judge, a journalist has neither the power nor the responsibility to impose formal, tangible, state-enforced punishment on accused wrongdoers. Unlike jurors, the journalist lacks the authority to choose an interpretation of events upon which the state must act. The state confers those powers on formal actors in the criminal justice system. Yet the journalist does judge—not necessarily in the language of a report on facts uncovered, because that language may be deliberately flat in its effort to maintain an appearance of objectivity, but in the selection of the story to tell and of how and where to tell it.²¹ When *The New York Times* devotes thousands of words and precious space on its front page to a story about potential corrupt dealings by a U.S. corporation overseas, that represents an obvious exercise of judgment, even if the article does not state that laws were broken and penalties should be imposed.²² Likewise the failure to report on or to emphasize the race of a criminal defendant and of the jurors hearing his case represents an exercise of judgment, conscious or unconscious, about the salience of such facts.

The frightening and dangerous responsibility of imposing a sentence belongs to the judge, for good reasons. The judge must justify a decision, and that decision is subject to appeal; the judge is an employee of the state, the entity imposing punishment; the judge is charged with respecting the rights of the defendant in reaching a determination of guilt. A criminal enforcement proceeding is an arena in which we may all prefer oversight by the government to that by a newspaper.²³

various filters, conformity to the needs and interests of privileged sectors is essential to success" for the journalist).

²¹ See HERMAN & CHOMSKY, *supra* note 19.

²² See David Barstow, *Vast Mexico Bribery Case Hushed Up by Wal-Mart After Top-Level Struggle*, N.Y. TIMES, Apr. 22, 2012, at A1 (the article, part of a series, described potential misconduct by Wal-Mart in Mexico, and it won a Pulitzer Prize).

²³ Then again, maybe not. This is in contrast to the widely quoted view of Thomas Jefferson, who said, "[W]ere it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter." THE PAPERS OF THOMAS JEFFERSON 48–49 (Julian P. Boyd et al. eds., 1950), reprinted in 5 THE FOUNDERS' CONSTITUTION 121, 122 (Philip B. Kurland & Ralph Lerner eds., 1987), http://press-pubs.uchicago.edu/founders/documents/amendI_speeches8.html.

After all, while the media can shame on a massive scale,²⁴ confiscation of physical liberty still represents an intrusion of a different quality.

There are similarities between the journalist and the various agents of criminal justice. Like the prosecutor, the journalist has the discretion to decide whether to try to tell a particular story and to choose the manner of the telling. Like the prosecutor, the judge and the jury, the journalist must live with the consequences of making the attempt and, to varying degrees depending on the circumstances, bears the risk of errors of judgment. Prosecutors, judges and juries, despite the power granted to them by the state, may find their decisions second-guessed, undermined, and undone;²⁵ journalists may find their methods exposed, their narrative choices dissected, their conclusions rejected. Turnabout is fair play for those in the media: lapses by reporters become themselves the subject of media analysis.²⁶ Not surprisingly, often the most fraught decision a journalist or prosecutor faces is the initial one, whether to try to tell a particular story at all.

B. *The Nature of Serial*

At its best, reporting on the criminal justice system typically levels one or both of two powerful critiques. First, reporting identifies ways in which criminal justice is unfair, for example by unjustifiably treating people differently depending on characteristics, like race and class, that should not be relevant to assessment of guilt at any stage of the proceedings. Second, reporting discloses how the blinkered agents of justice are flawed seekers of truth both because of choices they make that exclude relevant context from proceedings and because of tactical choices they make to bolster the odds of conviction. The first critique questions criminal law enforcement as a system, the second questions the efficacy of the tools that the system relies on to produce outcomes. *Serial* hints at mounting the first type of critique but ultimately limits itself to the second, and gently, at that.²⁷

All forms of reporting, mounting any type of critique, operate in an increasingly challenging environment. The changes wrought by technology and a

²⁴ See, e.g., Jessica Bennett, *Monica Lewinsky Is Back, but This Time It's on Her Terms*, N.Y. TIMES (Mar. 19, 2015), <http://www.nytimes.com/2015/03/22/style/monica-lewinsky-is-back-but-this-time-its-on-her-terms.html> (describing the traumatic impact of media scrutiny of the personal life of Monica Lewinsky and describing a degree of remorse).

²⁵ See, e.g., Duff Wilson, *Prosecutor in Duke Case Is Disbarred for Ethics Breaches*, N.Y. TIMES (June 16, 2007), <http://www.nytimes.com/2007/06/16/us/16cnd-nifong.html> (reporting on the discipline imposed on the prosecutor who pursued rape charges against members of the Duke University lacrosse team).

²⁶ The radio program (and podcast) *On the Media* does this too frequently to recount.

²⁷ Writing about the podcast for *The New Yorker*, Sarah Larson wrote that *Serial* was “an exposé, if unwittingly so, of the terrible flaws in our justice system,” and then went on to identify the kinds of problems that abound in the implementation of criminal justice, problems that form the context for the case studied in *Serial* but that went unaddressed in the story. Larson, *supra* note 5.

fast-evolving economy have taken their toll on the institutions that have historically invested in investigative journalism. Newspapers have endured waves of layoffs; traditional television news has not devoted compensating resources to coverage as they wage battle against cable news networks, which in turn compete with each other to hold on to viewers who have more options than ever as they consume news via their smartphones, tablets, and computers. In this environment, the runaway success of *Serial* offers a welcome sign of hope for serious, deep reporting on complex phenomena. The fact that the equivalent of an old-time radio program can hook millions of people is a good sign.²⁸

Serial chronicles the re-investigation of a 1999 murder case by Ms. Koenig. Intriguingly, the series is not complete when the first episodes become available online. As a result, new potential witnesses contact Ms. Koenig after hearing earlier episodes of the program. They offer tantalizing memories of the events on the day that police believe the victim was killed or, in one puzzling instance, simply share a professional assessment of the case.²⁹ This choice to present each episode before knowing the conclusion of the series lends an air of immediacy to *Serial*, a sense of excitement enhancing the thrill of listening to Ms. Koenig's thoughtful musings and her conversations with various people involved. The podcast is beautifully paced and conveys well the forward, backward, and sideways progress of the investigation; so engaging is Ms. Koenig's presentation of her findings that some members of the audience set up their own forums to analyze and discuss the evidence.³⁰

Let me provide a warning at this point: Those who have not listened to the podcast may wish to stop reading here. The following paragraphs summarize significant facts of the case and contain spoilers. The discussion throughout the balance of this essay will reveal some of the critical turns in the investigation.

The enigma at the heart of *Serial* is Mr. Syed, who was convicted in 2000 of the first degree murder of his ex-girlfriend and high school classmate, Hae Min Lee. The testimony of an acquaintance, Jay Wilds,³¹ puts Mr. Syed at the scene of the crime; one of the damning facts supporting Mr. Wilds's version of events is his

²⁸ Not that *Serial* shows a way to overcome the financial challenges facing news organizations. The podcast was available at no charge. The program also enjoyed support from a few corporate sponsors.

²⁹ *Serial: Rumors*, CHICAGO PUBLIC MEDIA (Dec. 11, 2014) (downloaded using iTunes), at 21:10. Charles P. Ewing, a forensic psychologist and lawyer who is a Distinguished Service Professor and the Director of the Advocacy Institute at the State University of New York Buffalo Law School, spoke on the podcast to offer his assessment of the case after listening to previous episodes of *Serial*.

³⁰ Reddit hosts a forum devoted to *Serial*, for example, at <http://www.reddit.com/r/serialpodcast/>.

³¹ The legally inclined listener very early on wants to know, what did Mr. Wilds get in exchange for incriminating Adnan? This tantalizing fact is not revealed in the first or even the second episode.

knowledge of the location of Ms. Lee's missing car. Mr. Wilds claims that he helped Mr. Syed bury Ms. Lee's body. The trouble is, each time he describes the afternoon that Mr. Syed allegedly strangled Ms. Lee, Mr. Wilds changes details. When Ms. Koenig sets out to recreate that afternoon, to see whether it is physically possible to get from Mr. Syed's high school to the scene of the crime, she finds the timing extremely tight.³²

Former classmates of Mr. Syed express shock that the young man they knew could have committed the crime of which he was convicted. As Ms. Koenig explores the social milieu of the group of high school students to which Mr. Syed belonged, as she confronts both the limits of recollection and, perhaps, incentives to mislead—as she faces the grey uncertainty that confronts any effort to make sense of human behavior—*Serial* turns more speculative. Ms. Koenig shares her concern with us, the listeners, that Mr. Syed might be guilty, that he might be a manipulative sociopath hoping to turn media coverage to legal advantage.³³

Trying to assess the strength of the case and the validity of her reactions to it, at one point—in episode seven, to be precise—Ms. Koenig turns to the Innocence Project, a clinical program at the University of Virginia School of Law. She talks with Deirdre Enright, the professor overseeing the clinic, about Mr. Syed's case. Following this, Professor Enright offers to deploy a team of her law students to investigate the murder case. Ms. Koenig accepts the offer, but insists that the clinic conduct its investigation independently of her own.

“My job, unlike theirs, is not to figure out if or how I can exonerate Adnan [Syed],” Ms. Koenig explains to listeners.³⁴ It is a fascinating and important distinction she draws, one that this essay will return to below.³⁵ Professor Enright and the law students tear into the record of Mr. Syed's case and come back with a host of questions about forensic testing that was and was not conducted, potential new lines of investigation, and a theory involving an alternative perpetrator of the crime. As Ms. Koenig put it, the students are “on the lookout for another explanation entirely.”³⁶ She likens them to “explorers headed for a bold new world”³⁷—a world she declines to explore. “Me, I’m going to stay right here at home, with my little garden spade, and keep scraping at the thing that confuses me most: Jay [Wilds].”³⁸

³² *Serial: Route Talk*, CHICAGO PUBLIC MEDIA (Oct. 23, 2014) (downloaded using iTunes).

³³ *Serial: The Opposite of the Prosecution*, CHICAGO PUBLIC MEDIA (Nov. 6, 2014) (downloaded using iTunes).

³⁴ *Id.* at 17:45.

³⁵ *See infra* Section III.E.

³⁶ *Serial: The Opposite of the Prosecution*, *supra* note 33, at 31:00.

³⁷ *Id.* at 31:05.

³⁸ *Id.* at 31:19.

III. CRITICAL MOMENTS

Mr. Wilds's story creates a critical moment in *Serial*. His testimony was nearly the entire case against Mr. Syed and raises difficult questions about how his shifting statements could result in conviction: what else was at work? In excavating the case against Mr. Syed, Ms. Koenig explores the possibility that racism or xenophobia might have influenced members of the jury, that jurors were disposed to believe the worst of a Muslim defendant. But the larger question of bias in the arrest, prosecution, and sentencing remains unaddressed. *Serial* does not tackle questions about the fair administration of justice generally, and adopts what some scholars characterize as an "episodic" format, drilling into a single story rather than "present[ing] collective or general evidence."³⁹

This Part explores five moments implicating issues lurking beneath the facts presented in the podcast, to put the investigation into a broader context. This Part identifies the questions raised by the conduct of prosecutors; the significance of the possibility of a plea deal for Mr. Syed; the role of race; the determination of punishment; and most significantly of all from a meta- and macro-perspective, the failure to reach a definitive truth.

Before going further, I acknowledge that it is easy to indulge in *ex post* criticism of a journalist's decisions; inevitably, for the sake of a story, some material must be cut, some context must be ignored. Like the trial lawyer, the long-form journalist must exercise considerable judgment over what to include and what to exclude. A reporter has no obligation to pursue a progressive, or any other, political agenda. This is a valid criticism of the arguments offered below.

Nonetheless, I contend that critical reflection on ways in which a news story can advance understanding of the difficult and often unsettling ways in which criminal law is enforced is useful. First, scholars who study criminal law and procedure should be sensitive to the ways that these matters are portrayed to a wider audience. Second, reporters should reflect on their decisions on how to report because there is no objective measure of newsworthiness upon which they may safely rely. Accordingly, the concerns below do not constitute censure in the sense that they should be interpreted as a catalogue of mistakes, but rather commentary offered in the hope that future reporting will take advantage of opportunities to provoke public thoughtfulness through the telling of a story.

A. Prosecutorial Conduct

Mr. Wilds's plea deal and the fact that the prosecutors helped him get a lawyer do not surface for several episodes. These facts raise questions about

³⁹ SHANTO IYENGAR, IS ANYONE RESPONSIBLE?: HOW TELEVISION FRAMES POLITICAL ISSUES 14 (1991) (noting that in the context of television news coverage, episodic reports are easier, while what the author identifies as "thematic" coverage requires more analysis and interpretation and so is more vulnerable to charges of bias).

prosecutorial discretion and the fairness of convictions that depend on vulnerable and conflicted witnesses picked by agents of the state who, for reasons legitimate or not, have a particular suspect in their crosshairs.⁴⁰ Ms. Koenig suggests that Mr. Wilds's arrangement with prosecutors was unusual rather than a typical example of the power imbalance between criminal defendants and the state. The implicit message is, if the conduct in Mr. Syed's case is unusual, then in most cases defendants receive fairer treatment, and listeners need not worry.

Sarah Lustbader, a Bronx public defender, challenges Ms. Koenig's claim that Mr. Wilds's deal is an outlier, writing in an op-ed in *The Washington Post*, "My colleagues and I are no longer shocked by this kind of thing."⁴¹ Ms. Lustbader goes on to offer a scathing critique of criminal enforcement, drawing on her experience representing criminal defendants. Her op-ed gives additional meaning to Mr. Syed's experience by highlighting the ways in which the defendant in a criminal case suffers crucial disadvantages relative to prosecutors, who have the benefit of evidence that the defendant and defense counsel may not see until it is too late to act upon it.⁴² This is context that helps to explain the practice of criminal law enforcement, without detracting from the story of Mr. Syed.

B. *A Plea Deal?*

Mr. Syed's case is exceptional in a significant respect: He went to trial. Most criminal defendants plead guilty⁴³ in a rational effort to reduce the potential penalty.⁴⁴ Professor Enright shares this fact with Ms. Koenig, who notes that the defendant in this case had resources and enjoyed community support. This observation suggests that defendants in other cases lack these advantages and may suffer consequences accordingly. Was the evidence of guilt in other homicide cases that resulted in conviction as ambiguous as that in Mr. Syed's case? Had convicted defendants in other cases had the advantages Mr. Syed enjoyed, would they have avoided conviction? And most importantly, if the answers to the two preceding questions are yes, is this criminal adjudicatory system the one that we want?

⁴⁰ *Serial* does not explore the decision to prosecute, the pressure that the district attorney's office might have been under to identify Ms. Lee's killer, or the motives and reasoning of the police officers investigating Mr. Syed. This is completely explicable: Those officers and prosecutors declined to speak to Ms. Koenig on the record about the case.

⁴¹ Lustbader, *supra* note 11.

⁴² *Id.*

⁴³ Approximately 95 percent of defendants who were convicted of a felony in 2004 had pleaded guilty, according to the Bureau of Justice Statistics. MATTHEW R. DUROSE & PATRICK A. LANGAN, U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2004 (2007), <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=909>.

⁴⁴ See Lustbader, *supra* note 41 ("[I]t almost always makes sense to take the offered plea; every day, innocent people plead guilty for that very reason.").

Perhaps ironically in light of the advantages Mr. Syed had going into his trial, his claim on appeal, which is pending as of this writing, rests on the argument that he was denied the chance to consider a plea deal. Mr. Syed contends that his lawyer provided ineffective assistance by failing to give him the option.⁴⁵ This is intriguing because Mr. Syed consistently asserts his innocence, even as he admits to Ms. Koenig that he does not remember the events of the afternoon on which Ms. Lee was killed. I say intriguing, because to assert after years in prison that he might have taken a plea is to open a door into a conversation about the pressure on criminal defendants to admit to crimes, regardless of actual conduct, in order to avoid the risk of exactly the outcome Mr. Syed experienced: conviction by jury and imposition of a devastating sentence.⁴⁶

The pressure on a criminal defendant to take a plea deal is not a new topic for those who practice in this area of law or for scholars who study it.⁴⁷ But it has not been a subject of prolonged, popular debate. The plea deal possibility raises questions about another catch-22 familiar to advocates on behalf of criminal defendants, involving whether to express remorse. Expressions of remorse can be mitigating factors at sentencing, but to express remorse is to confess. The convicted defendant who is actually innocent is in a no-win situation.

C. *The Omnipresence of Race*

Mr. Syed is a person of color, his parents are immigrants to the United States from Pakistan, and he is Muslim. Even more in our post-September 11th world than at the time of his trial in 1999, the possible salience of these facts in any criminal proceeding is evident, and Ms. Koenig does not ignore it.⁴⁸ Although she expresses skepticism about the possibility that racism could have driven the police investigation or the prosecution, she speaks to members of the jury to try to discern whether they may have been influenced by their perceptions of Mr. Syed's religious beliefs.

⁴⁵ Brief of Appellant at 14–15, *Syed v. Maryland*, No. 2519 (Md. Ct. Spec. App. Mar. 23, 2015), <http://mdcourts.gov/cosappeals/pdfs/syed/appellantsbrief.pdf>. The second claim of ineffective assistance focuses on the alleged failure of defense counsel to investigate a potential alibi witness.

⁴⁶ *Id.* at 1. Adnan was sentenced to life in prison for murder, an additional thirty years for kidnapping, and ten years for robbery (concurrent with the kidnapping penalty and consecutive to the murder penalty).

⁴⁷ See Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 409 (2001); see also WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 58 (2011) (“The lack of careful investigation that characterizes most felony prosecutions virtually guarantees that a significant number of innocent defendants are pressured to plead to crimes they did not commit.”).

⁴⁸ *Serial: The Best Defense is a Good Defense*, CHICAGO PUBLIC MEDIA (Dec. 10, 2014) (downloaded using iTunes).

“The jurors we spoke to said Adnan’s religion didn’t affect their view of the case,”⁴⁹ Ms. Koenig reports. Then she adds a few seconds later, “But when we pressed them a little more, it seemed stereotypes about Adnan’s culture were there, lurking in the background.” One juror tells Ms. Koenig that he did not think that religion played a role in Mr. Syed’s decision to kill but that culture might have, expressing the view that some cultures have particular views of the role of women in society⁵⁰ and at least implying that as a result of Mr. Syed’s resentment of Ms. Lee’s dating of another man after their breakup, Mr. Syed might have reacted violently.⁵¹

This is sensitive and potentially volatile material. If a reporter’s investigation finds that prosecutors’ or jurors’ views about culture, race, or religion affected decisions about a defendant’s guilt, that finding is an indictment of the legitimacy of the entire criminal enforcement enterprise. For this reason, no less august an entity than the federal Supreme Court has shied away from such a conclusion.⁵² At a profound level, the interviews of jurors by Ms. Koenig undermine the plausibility of objectivity as a goal in criminal proceedings. I confess I hoped for the kind of candid questioning she indulges in at the beginning of the podcast, when she mulls the reliability of memory, when talking about the thought processes of jurors.

In the wake of widely publicized killings of young black men by police officers in recent months and the rise of the Black Lives Matter movement in response, attempting to disentangle—or at least to identify—the myriad ways that race may permeate the investigation, prosecution and punishment of crime seems a particularly valuable exercise. Ms. Koenig tells us that she is skeptical that bias based on race or religion could have driven the prosecution of Mr. Syed, but studies of bias have found that “a person’s non-conscious racial beliefs (stereotypes) and attitudes (prejudices) affect her or his behaviors, perceptions and judgments in ways that she or he are largely unaware of and, typically, unable to control.”⁵³ Such “implicit bias” need not be conscious to have effects, and studies find bias against nonwhites in people of various racial and ethnic backgrounds.⁵⁴

⁴⁹ *Id.* at 15:58.

⁵⁰ *Id.* at 16:36 (juror William Owens asserting that in some cultures, women are “second-class citizens” and opining that Adnan “just wanted control and she wouldn’t give it to him”).

⁵¹ This was the motive asserted by prosecutors at the second trial, which resulted in Adnan’s conviction. Caitlin Francke, *Jury Finds Teen Guilty of Killing Ex-Girlfriend*, BALT. SUN (Feb. 26, 2000), http://articles.baltimoresun.com/2000-02-26/news/0002280318_1_woodlawn-high-min-lee-syed.

⁵² *McCleskey v. Kemp*, 481 U.S. 279, 314–15 (1987) (rejecting death row inmate’s statistical evidence of bias in the imposition of capital punishment in Georgia and justifying the decision in part because his “claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system”).

⁵³ L. Song Richardson, *Cognitive Bias, Police Character, and the Fourth Amendment*, 44 ARIZ. ST. L.J. 267, 271 (2012).

⁵⁴ *Id.* at 272.

Studies of cognitive bias find that the behavior of members of outsider groups—for example, people who differ phenotypically from the observer—is subject to more negative interpretation than the behavior of members of the same group.⁵⁵ People “who identify with an ingroup are more likely to process behavior and information from outgroup members using stereotypic and biased judgments.”⁵⁶ Muslims have long been members of an outsider group; Edward Said’s classic *Orientalism* provides a devastating description and analysis of this history.⁵⁷ It is not so far-fetched to presume, especially in light of the juror comments mentioned above, that views of Mr. Syed’s background, his culture and/or his religion, may have eased the path to conviction. The possibility demands careful consideration.

D. *The Propriety of Punishment*

Indirectly, *Serial* questions the moral authority of punishment under conditions of uncertainty. Ms. Koenig’s reporting uncovers numerous holes in both the story told by the government and that offered by the defendant. She identifies inconsistent evidence and inconvenient facts, conflicting and at times shifting testimony. For example, she retraces Mr. Syed’s steps on the day of the murder, as alleged by the government, and in the process illustrates how difficult it would have been for him to have acted consistently with the state’s timeline. This excellent reportage undermines the strength of the prosecution’s case, but avoids the larger question, implicated in Mr. Syed’s story, about the integrity of criminal law enforcement.

In the final episode of the podcast, Ms. Koenig tells listeners that she cannot conclude, based on the evidence she has spent a year reviewing, that Mr. Syed is guilty beyond a reasonable doubt. In other words, had she been on the jury hearing his case, she would not have voted to convict.⁵⁸ (This is a critical moment in the podcast that I address in more detail below, for different reasons.) She does not identify a particular, dispositive piece of evidence that leads to her conclusion.

Serial does not try to determine whether the degree of ambiguity in Mr. Syed’s case is unusual. But that is not the end of the inquiry. Because if there is a chance that careful study of other cases, perhaps many other cases, would lead to the kind of uncertainty of guilt expressed by Ms. Koenig, then that is reason to question the procedures that can result in incarceration or execution of criminal defendants.

⁵⁵ Rebecca Hollander-Blumoff, *Social Psychology, Information Processing, and Plea Bargaining*, 91 MARQ. L. REV. 163, 179 (2007).

⁵⁶ *Id.*

⁵⁷ EDWARD SAID, *ORIENTALISM* (1978).

⁵⁸ *Serial: What We Know*, CHICAGO PUBLIC MEDIA (Dec. 18, 2014) (downloaded using iTunes).

E. The Evanescent Truth

From the beginning, Ms. Koenig pledges to her audience that she will deliver an answer, a form of closure, a reward to those who follow her reporting. She reiterates this promise in *Serial*'s ultimate episode, telling listeners, "Of course I have an ending, we're going to come to an ending today."⁵⁹ This is bold, given all the ambiguity she finds. Recognition of ambiguity is really a virtue of the project, because it conveys the potential tragedy resulting from law's need for the appearance of certainty.

Yet the promise of an answer is necessary given the underlying presumption, discussed above, that a journalist's inquisitive eyes can uncover the truth. Anyone who listened to the program to its end must have felt building excitement over the course of episode twelve, awaiting Ms. Koenig's resolution. But instead of undermining faith in the investigative ability of institutions of law, she relies on the law. Ms. Koenig tells listeners that as a juror, she could not have voted to convict Mr. Syed, even though she is uncertain of his innocence.⁶⁰ Instead of criticizing the *process* that led a jury to convict, she expresses disagreement with the outcome produced by *this* particular jury.

Serial does not suggest that the criminal justice system operates unfairly or immorally. Rather, at the end of the podcast Ms. Koenig leaves listeners thinking, perhaps Mr. Syed committed the crime and perhaps he did not. Members of the jury thought he did, and listeners persuaded that *Serial* discovered too much ambiguity no doubt think he did not. *Serial*'s conclusion undermines potential criticism of the criminal law enforcement system.

This matters, because stories can bolster or call into question the rationale for the enforcement regime that we have. Successful efforts to effect social and legal change require a "powerful narrative,"⁶¹ as Richard Delgado has put it. Collected fictions about the fairness of the adversarial system, the neutrality of jurors, the objectivity and expertise of investigators, the skill and ethics of prosecutors and defense lawyers, among many others, justify the criminal justice system. To the extent that *Serial* does not address and criticize explicitly the narratives that support some of the problematic practices of criminal enforcement, the podcast affirms rather than challenges.⁶²

⁵⁹ *Id.* at 2:23.

⁶⁰ *Id.* at 51:30.

⁶¹ Richard Delgado, *Rodrigo's Homily: Storytelling, Elite Self-Interest, and Legal Change*, 87 OR. L. REV. 1259, 1265 (2008) (book review).

⁶² Perhaps, writ small, *Serial* bolsters the criticisms of the media leveled by Herman and Chomsky, among others. See *supra* note 13.

IV. OF SECOND- AND THIRD-YEAR LAW STUDENTS AND SILVER LININGS.

One group of listeners becomes very involved in *Serial*: students in Professor Enright's clinic, the Innocence Project at the University of Virginia School of Law. Recall that the podcast introduces her and the clinic in episode seven, and her team of students wades through the evidence and offers an assessment both of potentially fruitful avenues for further investigation and of the odds of success in any future legal proceedings. To do this, the students must study and understand what kind of evidence is potentially useful in the eyes of the law, they must develop a plan to gather that evidence, and they must implement the plan. Professor Enright sends her team, which consists of two third-year and three second-year law students,⁶³ to pursue alternative explanations of Ms. Lee's death. On an independent podcast released by the School of Law, Professor Enright interviews her students about the case, the law, and the lessons they learned from their involvement.⁶⁴ Aspiring lawyers should listen to this podcast, and lawyers whose faith is flagging may want to listen, too.

The discussion Professor Enright has with her students makes clear that the clinic has a plan. Professor Enright and her students have a playbook that they intend to follow and their actions will be dictated both by their experience and by their understanding of what the law requires. They know that they must look for specific facts to support arguments that have a chance of succeeding on appeal.

The students discuss the first steps to be taken in any new case, beginning with study of events around the crime in question.⁶⁵ Then they turn to forensic evidence and procedures for getting it tested in Maryland. There is a statute, explains student Katie Clifford '15: "You file a motion to test, which the team wrote earlier this semester, and when you file it then the state's attorney in Maryland has the opportunity to respond to it or they can either oppose it or they can join it or they can kind of take no action."⁶⁶ The motion is subsequently decided by a judge at a hearing, she continues.⁶⁷

Professor Enright and her students talk about details, about reasons that the Maryland prosecutors might oppose testing of evidence that has not been analyzed previously. This evidence includes a rope found near Ms. Lee's body and a rape kit, either of which could conceivably lead to identification of a person other than Mr. Syed as the potential killer. So could fingerprints, Professor Enright notes, and asks the students, "Somebody remind me, what's our fingerprint situation in

⁶³ Those students were Katie Clifford, Mario Peia, Jessica Saba, Kristin Sourbeer, and Vanessa Vogler. *What's Next for the "Serial" Investigation*, UNIVERSITY OF VIRGINIA SCHOOL OF LAW (Dec. 22, 2014), <https://soundcloud.com/uva-law/whats-next-for-serial-investigation>.

⁶⁴ *Id.*

⁶⁵ *Id.* at 7:40.

⁶⁶ *Id.* at 14:00.

⁶⁷ *Id.*

this case?” In response, Mario Peia ‘15 rattles off the locations of fingerprints in Mr. Syed’s car and identifies the locations of prints that did not belong to Mr. Syed. It is an illustration of the significance of fact investigation. The students describe the amount of work that they did and show the value of doing it. They discuss whether Mr. Syed’s lawyer was ineffective and describe the legal standard applicable to her conduct,⁶⁸ demonstrating the relevance of the law.

In the last moments of the podcast, Professor Enright exhorts the students “to say something fantastic.” The students rise to the occasion, as good students do in a clinic run by a professor with an uncanny ability to inspire. Mr. Peia says, “It took us all the semester last semester just to break down this case, before we could start actually writing the motion [to analyze untested evidence] . . . [T]he truth of the matter is we’re still looking for the truth of the matter, but it’s a large step forward.”⁶⁹

Mr. Peia’s observation captures both the challenges and rewards of the practice of law. It also reflects recognition both of the difficulty of finding out for sure what happened and of the inevitability of ambiguity. The students in the clinic may or may not determine the truth, but they do not need to, in order to correct a possible injustice.

V. CONCLUSION: UPON EXITING THE BAMBOO GROVE

Perhaps my hopes for *Serial* were unfair. No doubt Ms. Koenig and her team operated under constraints that we know nothing of. For example, the decision to start the podcast piecemeal, before all the reporting was completed, had to affect the project, as new witnesses appeared and various experts weighed in. The podcast is brilliant and evokes the experience of investigation in a way that most drama, true or fictional, often aspires to but rarely achieves. If investigative journalism modeled on this project burgeons, it could promote transparency in a democracy whose aging media industry is cutting back on costly and time-consuming reporting efforts. Perhaps a multitude of new journalists beholden to no institution will undermine the media hegemon some scholars have warned of. We can only hope that these other reporters will learn from the storytelling skill demonstrated by Ms. Koenig—and I, for one, eagerly await the next installment in the *Serial* franchise.

Still, I wish that *Serial* had taken on the deeper problems identified in the preceding pages, problems that surrounded and permeated the investigation, prosecution and punishment of Adnan Syed. I do wish that the podcast had explicitly addressed the inevitability of uncertainty—that Ms. Koenig had embraced ambiguity and used it to probe and unsettle, as Ryunosuke Akutagawa does in *In a Bamboo Grove*. Perhaps *Serial* will next take up a more critical

⁶⁸ *Id.* at 25:30.

⁶⁹ *Id.* at 30:50.

project and deploy its formidable intelligence and resources to tell a tale that provokes questions about law and process, humanity and justice, that are so difficult to answer but so essential to ask.